No. 2525

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

PHOENIX SECURITIES COMPANY
(a corporation),
*Plaintiff in Error,*

vs.

M. E. DITTMAR,
*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

L. A. REDMAN,
*Attorney for Plaintiff in Error.*

*Filed this.....day of March, 1915.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*



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### Statement of the Case.

The material facts in this case are as follows: In the month of October, 1906, Charles Kunze, acting on behalf of the Stauffer Chemical Company and having an interest in the proposed venture of that company, made inquiry of plaintiff (defendant in error) regarding the purchase price of certain mining claims in Shasta County owned by defendant (plaintiff in error). Kunze had been informed (erroneously) that plaintiff was interested in or was the agent of the owners of said claims (Trans. p. 37). Plaintiff told Kunze that he knew the owners of the property, who resided

in New York, that he intended presently to make a trip to New York on other business, and that while there he would call on the owners and get the desired information (p. 39). Kunze testified that at that time the probable price of the claims was discussed and also that the subject of plaintiff's commission in the event of the sale was mentioned (p. 36). Plaintiff testified that nothing was said regarding his commission until after his return from New York (p. 47). Plaintiff went to New York in December, 1906, and while there visited the office of Messrs. Hatch & Clute, defendant's attorneys, several times, and also saw certain officers of defendant. He discussed with them in a general way a sale of the property, but *did not mention the fact that Kunze had requested him to ascertain for what price it could be purchased* (pp. 54-6). He was told by Mr. Hatch that they would be willing to deal on an eighteen months' option for $75,000 (p. 41). He thereupon left for home promising to correspond with them (p. 56). Upon his return to California, he reported to Kunze that the price of the property was $75,000, to which he said would have to be added a commission which he suggested to Kunze should be about $25,000, to be divided between Kunze and himself. It was finally agreed between him and Kunze, the agent of the prospective purchaser and interested with it in the purchase (p. 48), that his commission should be $10,000 (p. 37), payable by that company out of the purchase price fixed by

them at $85,000 (p. 105). He thereupon telegraphed Hatch and Clute as follows: "Reliable parties ready to consider summit and adjoining property, price terms named. Answer" (p. 88). Correspondence ensued, and being pressed by Hatch and Clute to name the prospective purchaser, he did so, and stated that he had arranged for a commission of $10,000 (pp. 97-8). Hatch & Clute, however, assumed that he meant that he wanted a commission of $10,000 *payable out of the $75,000,* and they wrote to him that "we are very confident that our clients will not pay a commission to exceed 10% of the amount which they receive in cash or kind, and only when they receive it, and that deducted from that 10% must be any other expenses incident to the transaction so that the client will net out of any sale at least 90% of the purchase money or price" (p. 101). In response to this communication plaintiff informed Hatch & Clute that "I wish to state that I am not expecting you to pay me a commission of 10% on the purchase price of $75,000. I am taking care of myself over that amount, and have an understanding with the parties having the purchase of the property under consideration for a commission of $10,000 when the sale is concluded. Now I suggest that the transaction be made direct between the Phoenix Securities Company and the Stauffer Chemical Company for $85,000, not $75,000—and that you receive the full $75,000 cash for the property and give me an agreement to pay

the remaining $10,000 to me when the money is finally paid and the transfer concluded'' (p. 105). After further correspondence an agreement dated May 1, 1907, was entered into between defendant and the Stauffer Chemical Company whereby said company was given the option to purchase the property within eighteen months for $85,000 (pp. 129-49). The agreement contains no reference to the payment of a commission in the event of a sale at such a figure. By another provision of the agreement the Chemical Company was given the right to purchase the property within ninety days for $50,000 plus a commission to plaintiff of $5000 (p. 146). Plaintiff notified the Chemical Company that he expected to get from it and defendant a contract for the payment of a commission of $10,000 in case of a sale for $85,000 (p. 117) but he failed to follow up this notification and no such contract was in fact made by either defendant or the Chemical Company. The Chemical Company did not avail itself of the right to purchase the property for $55,000 in ninety days, nor did it exercise the option to purchase the property for $85,000 in eighteen months, but on December 19, 1907, it notified defendant that *it would not purchase the property under the latter option* (the former having expired) and sought and obtained more favorable terms (pp. 149-55)—terms under which *after a lapse of more than eight years* defendant, *if outstanding obligations are paid,* will receive $66,000, less certain heavy charges and

expenses incident to the transactions necessitated by the new arrangement (pp. 77-86; 73).

Plaintiff filed no less than five complaints in the action. In his earlier pleadings he sued the Stauffer Chemical Company as well as the Phoenix Securities Company, alleging that it was indebted to him for the services alleged to have been rendered at its request. He, however, later dismissed the action as to the Stauffer Chemical Company.

In his last amended complaint plaintiff sets up three different causes of action. In the first count he alleges that

> "sometime prior to the first day of May, 1907, defendant * * * made and entered into an agreement with plaintiff by the terms of which said agreement defendant did authorize plaintiff *to find a purchaser for the aforesaid group of mines;* and defendant did further agree that if and when plaintiff should find a purchaser for the aforesaid group of mines who should be *ready, willing and able to purchase the aforesaid group of mines for the sum of not less than $75,000 net to defendant* and payable upon such terms as might be arranged and satisfactory to defendant that defendant would upon the completion and consummation of such sale pay to plaintiff on account of the services of plaintiff in furnishing such purchaser to defendant such sum of money *in excess of said sum of $75,000 as said group of mines might be sold by defendant to such purchaser so furnished by plaintiff*".

It is further alleged in said count of said complaint that plaintiff

> "did undertake to find a purchaser for the aforesaid group of mines and on or about the first day of May, 1907, plaintiff did *discover a prospective purchaser for said properties* and did introduce and bring to defendant as such purchaser a certain corporation known as Stauffer Chemical Company, a person who was then and there *willing, able and ready to purchase the aforesaid group of mines from defendant, and did then and there agree to purchase the same and to pay therefor the sum of $85,000,* provided terms of payment of said sum of $85,000 could be arranged satisfactory to defendant and to said Stauffer Chemical Company" (pp. 1-3).

In the second count of the complaint it is alleged that defendant authorized plaintiff to find a purchaser for said property *for the sum of $85,000,* and that plaintiff did find such purchaser and that defendant on February 1, 1908, *sold said property to said purchaser "for the agreed price of $85,000".* In this count plaintiff seeks to recover the reasonable value of his services in securing said purchaser which he alleges were worth the sum of $10,000 (pp. 4-6). In the third count it is alleged that the defendant agreed to pay plaintiff not $10,000 as a commission, but "ten per cent of such sum of money as *defendant might thereafter actually receive"* on the sale of the property. In this count it is alleged that defendant has received on the sale of the property the sum of $50,000 and "that although frequently thereunto demanded" defendant has failed and refused to pay to plaintiff the sum of $5000 (pp. 6-10). (The alleged demand

if made would have been premature in view of the fact that at the time of the commencement of the action defendant had received only $7950 (p. 35).) The case was tried before the Court sitting without a jury (p. 34) and judgment was rendered in favor of the plaintiff for $5000. The Court made no findings and delivered no opinion, and we are not advised upon what theory of the case judgment was so rendered. Presumably in view of the amount of the judgment ($5000) upon the theory that defendant was liable to plaintiff for the "reasonable value" of his services which the Court seemingly appraised at said sum.

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**Specification of Errors.**

1. The Court erred in deciding that defendant authorized plaintiff to find a purchaser for the property referred to in the complaint; and erred in deciding that plaintiff discovered a purchaser for said property; and erred in deciding that said purchaser agreed to pay the sum of $85,000.00, or any other sum for said property.

2. The Court erred in deciding that defendant authorized plaintiff to find a purchaser for said property for the sum of $85,000.00, or any other sum; and erred in deciding that on February 1, 1908, or at any other time, defendant sold said property for the sum of $85,000.00, or any other sum, and erred in deciding that defendant expressly

or impliedly agreed to pay plaintiff any sum whatsoever for his alleged services in procuring said purchaser; and erred in deciding that plaintiff did discover a purchaser for said property, and erred in deciding that plaintiff's services in that behalf were of the value of five thousand ($5000.00) dollars, or any other sum.

3. The Court erred in deciding that defendant agreed to pay plaintiff ten per cent, or any per cent of such amount as defendant should receive on a sale of said property to the purchaser alleged to have been discovered by plaintiff, or to any one; and erred in deciding that defendant had received $50,000 on the sale of said property.

4. The Court erred in not rendering judgment in favor of defendant.

5. The Court erred in overruling defendant's objection to the following question propounded to plaintiff:

> "Assuming the fact you stated with regard to the nature of these properties and their accessibility and the nature of the agreement which you originally had with the Phoenix Securities Company and the sale that was finally consummated, what in your opinion would be the reasonable value of your services in bringing about the final consummation of the deal?";

and erred in admitting in evidence the answer to said question as follows:

> "I consider under the circumstances the arrangement arrived at as not unreasonable; by the arrangement arrived at I mean that if

the mine developed I would ultimately receive my $10,000. If it did not, I receive nothing, so to that extent I felt that the reasonable chance I was taking with them probably entitled me to more than the usual ten per cent commission. In the other case where I agreed to ten per cent I believed that if the deal went through in a short time in ninety days or four months or even in six months, I would rather in that case have taken ten per cent than a somewhat larger commission in an indefinite way."

6. The Court erred in overruling the defendant's objection to the following question propounded to the witness Lane:

"I will ask you, Mr. Lane, what, in your opinion, would be the reasonable value of the services of a mining broker in effecting the sale of about 20 or 25 full-sized mining claims in the northern part of this State, and more particularly in Shasta County, the ore in the properties being principally copper, and the properties not being on the railroad, but about seven miles off, and connected with the railroad partly by wagon road and partly by trail; the properties being sold by the broker, or rather, a contract being entered into originally by the broker, or rather, a contract being entered into originally by the broker, for a purchase price of $85,000 on an eighteen months' contract, with an option that they might be taken in three months' time, for $50,000 cash, which agreement was subsequently modified by another agreement by which agreement the sellers secured $2500 cash at the time that the substituted agreement was entered into, and $33,500 in bonds and $15,000 in cash, making a total of $51,000 with $15,000 remaining unpaid

at the time that the broker made a claim for the reasonable value of his services?";

and erred in admitting in evidence the answer to said question as follows:

"The customary way of paying a commission is a certain percentage on the selling price, and that price on a sale of that kind—that commission—ought not to be less than ten per cent, and ordinarily we get more than that for it—of the selling price."

7. The Court erred in overruling defendant's objection to the following question propounded to the witness Lane:

"And also, Mr. Lane, disregarding the particulars of the agreement that I embodied in the previous question, and bearing in mind simply the nature of the properties that I described, namely, that there were a number of full-sized mining claims, bearing copper ore principally, in the northern part of the State, and situated, as I have stated before, what, in your opinion, would be the reasonable value of the services of a broker in securing the sale of those properties, what percentage?",

and erred in admitting in evidence the answer to said question as follows:

"Well, I should say not less than ten per cent" (pp. 45, 48-50).

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**Argument.**

We will first discuss the claims asserted in the second and third counts of said complaint.

1. Plaintiff seeks to recover in the second count the alleged "reasonable value" of his services in effecting a sale of the property and, as above stated, apparently judgment was rendered in his favor upon this count. But the evidence does not support the claim that the defendant either expressly or impliedly agreed to pay plaintiff the *reasonable value* of the services alleged to have been rendered by him in connection with the sale of the property. If a contract exists between him and defendant, it is *express* not *implied* in respect to his compensation. Now where the agreement is for the payment of a *commission* the question of the *value* of the service rendered by the broker is immaterial. It is contemplated that in many cases brokers will render services for which under the terms of their contracts, they are entitled to nothing. This is necessarily true of all business done on a *contingent* basis. Commissions are deemed to be sufficiently large to cover services rendered in cases where no commissions are earned.

> "The broker may devote his time and labor and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort or his authority is fairly and in good faith terminated he gains no right to commissions. He loses the labor and effort which were staked upon success, and in such event it matters not that after his failure and the termina-

tion of his agency what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met. He may have created impressions which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale. He may have planted the very seeds from which others reap the harvest; but all this gives him no claim. It was part of his risk that failing himself and not successful in fulfilling his obligation others might be left to some extent to avail themselves of the fruit of his labors. As was said in *Wylis v. Marine National Bank* (61 N. Y. 416): 'In such case the principal violates no right of the broker by selling to the first party who offers the price asked, and it matters not that the sale is to the other party with whom the broker has been negotiating. He failed to find or produce a purchaser upon the terms prescribed in his employment, and the principal was under no obligation to wait longer until he might make further efforts. The failure therefore and its consequences were the risk of the broker only.' "

*Sibbald v. Bethlehem Iron Co.,* 83 N. Y. 378.

"It can not be reasonably said that he was working under an express written contract if he could succeed in fulfilling its terms and under an implied contract if he could not accomplish that desired result. He took the risks of his employment and was subject to the results of failure or success under the provisions of his contract of agency."

*Brown v. Mason,* 155 Cal. 155 (160).

And what logical basis is there for the claim that *defendant* rather than the *Stauffer Chemical Company* should pay plaintiff the "reasonable value" of services rendered by him? Plaintiff approached defendant at the instance and in the interest of the Stauffer Chemical Company. He concealed from defendant the fact that the Stauffer Chemical Company was seeking to purchase the property and when a contract was sent plaintiff by defendant he took the liberty of making changes in it favorable to the Stauffer Chemical Company, thereby drawing from Hatch & Clute a protest against conduct inconsistent with assumed representation of defendant's interests—an assumption based upon plaintiff's concealment of the truth because he was not seeking *to find a purchaser*, but was seeking to effect a sale in favor of a party (to the exclusion of other purchasers) *who had found him* and from whom he expressly declared he was to get his pay (p. 105). Now why in such circumstances should not plaintiff render his bill to the Stauffer Chemical Company for the "reasonable value" of services rendered?

Plaintiff's claim that he was employed by defendant to find a purchaser is disproved by the evidence and is inconsistent with his relations with the Stauffer Chemical Company. Had he been so employed it would have been his duty to have endeavored to find a purchaser *to the exclusion of the interests of that company.*

Nor does the evidence support the allegation of this count of the complaint that the Stauffer Chemical Company "was then and there *willing, able and ready* to purchase the aforesaid group of mines from defendant and did then and there *agree to purchase the same and to pay therefor the sum of $85,000*". The fact is that the Stauffer Chemical Company never agreed to pay $85,000 for the property. By the agreement of May 1, 1907, it was given an option to purchase said property for the sum of $85,000, provided it did so within eighteen months (p. 137). It did not exercise this option, but on the contrary notified defendant *that it would not pay said sum* (p. 72). A new contract was thereupon entered into whereby if obligations thereunder of the Chemical Company are kept, it will have paid in 1916 the sum of $66,000, against which sum are heavy charges arising out of the transaction (pp. 77-86; 73).

It should be borne in mind considering this count of the complaint that the law requires for obvious reasons contracts of the character alleged in the complaint to be in writing.

*McCarthy v. Loupe,* 62 Cal. 299;
*Meyers v. Surryhne,* 67 id. 657;
*McPhail v. Buell,* 87 id. 115;
*McGeary v. Satchwell,* 129 id. 389;
*Jamison v. Hyde,* 141 id. 109.

For these reasons we submit that the Court clearly erred in overruling defendant's objections to testi-

mony respecting the "reasonable value" of plaintiff's services (pp. 44, 49-50); and erred in rendering judgment in favor of plaintiff on said second count.

2. The claim made in the third count is equally baseless. Defendant never agreed to pay 10% of the amount received by it on a sale of the property. Mr. Hatch wrote plaintiff that he was quite sure that his clients would not be willing to pay a commission "to exceed 10% of the amount they received in cash or kind and only when they receive it, and that deducted from that 10% must be any other expenses incident to the transaction" (p. 101). Plaintiff, however, asked for no such percentage contract, preferring to *increase* the price named by defendant ($75,000) to $85,000 with a view to getting in the contingency of a sale at such a figure a *larger commission* than 10%. He wrote to Hatch & Clute that "I wish to state that I am not expecting you to pay me a commission of 10% on the purchase price of $75,000. *I am taking care of myself over that amount* and have an understanding with the parties having the purchase of the property under consideration for a commission of $10,000 when the sale is concluded" (p. 105). The letter of Mr. Hatch of April 26, 1907, in which he said "you surely have a letter from us that your commissions are to be 10%, and this letter confirms my understanding of it", (p. 124) refers to a commission of 10% *in the event of a sale for $50,000 within ninety days* (p. 146). But no such percent-

age agreement was in fact made *even in respect to such a contingency.* The agreement of May 1, 1907, provided for a sale for the gross sum of $55,000, *$5000* of which was to go to plaintiff as and for his commission (p. 146). Nowhere in the correspondence subsequent to plaintiff's statement that he had arranged with the Chemical Company for a commission of $10,000 is there any suggestion of the payment of a *percentage commission* in the event of a sale after 90 days.

3. There remains for consideration the first count of the complaint. As above stated it is alleged therein that defendant

> "did authorize plaintiff to find a purchaser for the aforesaid group of mines; and defendant did further agree that if and when plaintiff should find a purchaser for the aforesaid group of mines who should be *ready, willing and able to purchase the aforesaid group of mines for the sum of not less than $75,000 net to defendant* and payable upon such terms as might be agreeable and satisfactory to defendant that defendant would upon the completion and consummation of such sale pay to plaintiff on account of the services of plaintiff in furnishing such purchaser to defendant such sum of money in excess of said sum of $75,000 as said group of mines might be sold by defendant to such purchaser so furnished by plaintiff".

And it is further alleged that pursuant to the aforesaid authorization and agreement plaintiff discovered a prospective purchaser for said properties, who was then and there

> *"willing, able and ready to purchase the aforesaid group of mines from defendant and did then and there agree to purchase the same and to pay therefor the sum of $85,000"* (pp. 2-3).

If the contract was as alleged in said first count to pay plaintiff as a commission *any sum in excess of $75,000* received by defendant from a sale of the property, it is obvious that plaintiff is not entitled to recover. For the fact is that the Stauffer Chemical Company never agreed to pay for said property any sum in excess of $75,000, never has paid any such sum and never will pay it. The option of May 1, 1907, was not an agreement to pay $85,000 and no such payment was ever made thereunder. The allegation of the complaint that the Chemical Company "did then and there agree" to pay $85,000 for the property is untrue. Nor did it subsequently "on or about the first day of February, 1908," or at any time agree to pay or pay $85,000 for the property, nor anything in excess of $75,000. The fact is that the total amount which defendant will realize upon said contract, if it is kept by the Stauffer Chemical Company will be, *not within eighteen months,* but after more than *eight years,* $66,000, less heavy expenses incident to the transaction. What then becomes of plaintiff's claim based upon an alleged agreement to pay *him the excess above $75,000* received by defendant for the property?

The difficulty in which plaintiff finds himself is due entirely to the risk which he voluntarily

assumed, when upon being informed that defendant was willing to sell for $75,000, he *raised the price* to the purchaser to $85,000 *with a view to getting a large contingent commission.* Plaintiff sought to make it appear that defendant fixed $75,000 as its *net* price, but this pretense finds no support in the evidence and is disproved by Mr. Hatch's letter in which he informs plaintiff that his clients would not pay a commission of more than 10% upon the price named ($75,000). Defendant did not suggest $85,000 as the price of the property. That figure was made by plaintiff *in order to realize a commission of $10,000.* He at first without any authority from defendant named $100,000 as the purchase price, $25,000 of which he proposed to divide with Kunze (p. 36). It may well be that if plaintiff had named $75,000 instead of $85,000 as the purchase price in the option of May 1, 1907, the Chemical Company might have been paid that amount within the eighteen months stipulated therein. And if so and plaintiff had arranged for a *ten per cent commission on its purchase price* less expenses as suggested by Hatch & Clute, it would have been to the advantage of both the defendant and himself. But plaintiff's desire to make a larger winning for himself resulted in no winning at all. A broker and his principal are at liberty to make any agreement they choose respecting the payment of a commission. They may agree that the commission is earned if a contract to purchase is executed, or that it is earned if an option

is given, or they may stipulate that it shall be paid only when the money agreed to be paid has in fact been paid, or that it shall be dependent upon any other specified contingency. The election of the Stauffer Chemical Company not to purchase the property under the option agreement of May 1st is determinative of plaintiff's right to a commission *which according to his complaint was to be the excess above $75,000 paid by that company.* No claim is made, and if made would be without support in the evidence, that there was any collusion between defendant and the Stauffer Chemical Company to defraud plaintiff of a commission. There is no suggestion of anything of the kind. Defendant *was anxious that the option to take the property would be exercised by the Chemical Company* and only consented to a different and far less favorable proposition when it was notified by the Chemical Company *that it would not take the property* upon the terms stated in the option agreement. *Defendant had no reason to doubt the good faith of this statement, and was therefore justified in acting upon it.* The contingency then, upon which plaintiff's claim to a commission rested never occurred. The fact that a sale thereafter was made is immaterial. *Plaintiff did not bargain for compensation for his services regardless of what the property sold for.* He gambled upon a sale for $85,000—a figure named by himself—and he lost. In his letter to Mr. de Guigne, the president of the

Chemical Company, under date of April 20, 1907 (defendant's exhibit 14) he wrote:

> "I wish to state also that in addition to signing up contracts between ourselves, I shall expect a contract concurred in by both yourself and the Phoenix Securities Company, to pay me the $10,000 commission decided upon in case the property is acquired at the gross price of $85,000 on the eighteen months' option —and in case it is acquired for a lesser amount in shorter time then I am to receive 10% of the purchase price" (p. 117).

No such contract was in fact executed. But assuming that it was, the fact is that the property was not acquired at the gross price of $85,000 on the 18 months' option, nor for a lesser amount in shorter time. Now upon what principle of law may plaintiff without the consent of the other parties to the arrangement modify it so that he may recover a commission of $10,000 in a specified contingency or *another unspecified commission in a contingency not mentioned? Non constat* the other parties would not have been willing to pay as much as $10,000 in the one event *if in another less favorable contingency they would also be obliged to pay a commission.* As well might plaintiff argue that he was to be paid $10,000 in case the property was purchased for $85,000 in eighteen months *and that he was to be compensated for services rendered even if no sale at all was made.* Services rendered in cases where no commissions are earned are deemed to be paid for by commissions received in other cases where the services rendered may be and

usually are of less intrinsic value than the amount of the commission received. Where a broker is working on a commission basis the question of the value of his services whether he succeeds or fails is a false quantity. His losses in some cases are presumably equalized by his gains in others. Quoting again from *Sibbald v. Iron Co., supra:*

> "It follows as a necessary deduction from the established rule that a broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and the contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, and his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which was staked upon success. And in such event it matters not that after his failure and the termination of his agency what he has done proves of use and benefit to the principal. And in a multitude of cases this must necessarily result. He may have introduced to each other parties who would otherwise have never met; he may have created impressions which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reaped the harvest; but all that gives him no claim. It was part of his risk that failing himself and not successful in fulfilling his obligations others might be left to some extent to avail themselves of the fruit of his labors."

In the case of *Rees et al. v. Spruance,* 45 Ill. 308, which is somewhat analogous to the case at bar the Court in denying plaintiffs any relief said that:

> "The defendant it is true found a purchaser through information furnished by the broker and would seem to be under a moral obligation to give him a reasonable compensation for the services thus rendered."

But for the reasons above pointed out we submit that this is an erroneous view. If brokers have a moral claim for services rendered regardless of the contingencies specified in their contracts then by the same reasoning they should *reduce* their commissions to correspond with the intrinsic value of the services rendered. A broker may earn by turning his hand over a commission of many thousands of dollars, and in such a case he would not favorably entertain a suggestion that he was under any moral, legal or other obligation to remit any part of his commission.

Assuming in the case at bar that the Stauffer Chemical Company had paid $85,000 for the property within eighteen months will anyone say that the *reasonable value* of the services rendered by plaintiff was $10,000? Would not plaintiff have been willing and anxious to render the same service for one-tenth of that amount, or even less, if the lure of a large contingent commission had been removed? He was not employed by defendant to find a purchaser as he alleges in his complaint, nor did he find a purchaser. The purchaser *found him*

(a fact which he concealed from defendant) and requested him to render the simple service of ascertaining what the property could be purchased for. This could have been ascertained by the purchaser himself, but he went to the plaintiff in the mistaken belief that plaintiff was a part owner of the property or the agent of the owner (p. 37). Nor was it necessary to go to New York to ascertain what plaintiff learned while there. A letter would have sufficed. And he delayed going until other business required his presence there (p. 39). He asked for no *compensation* for his trouble, but set about to figure how he could earn a large *contingent commission.* His counsel contend that he represented the defendant in the transaction. But the truth is that he represented himself. He was not frank in his dealings with the officers and attorneys of the defendant while in New York. He did not disclose to them the real situation and intentionally refrained from mentioning the subject of commission until he returned to California. He then without consulting them advised Mr. Kunze that the "net" price of the property was $75,000 (which was not so) and suggested that a gross figure of $100,000 be named in order that a commission of $25,000 might be realized (p. 38). He finally *without consulting defendant* fixed the gross figure at $85,000. After this had been arranged by him, not as a representative of defendant, *but in his own interest,* he telegraphed to Hatch & Clute that "*reliable parties* ready to consider Sum-

mit and adjoining properties. Price terms named. Answer'' (p. 88)—a communication that ''mystified'' Mr. Hatch (p. 89). Subsequently, on February 18, 1907, plaintiff notified defendant that the Stauffer Chemical Company was the purchaser; that it was willing to pay $75,000 for the property and that his ''commission in the deal will amount to $10,000''. He did not as a representative of defendant should have done negotiate for a commission *on the selling price,* but he arbitrarily added to the selling price a commission as if this was a matter with which defendant had no concern. He refers to $75,000 as defendant's ''price'' and $10,000 as his ''commission''. Hatch & Clute, however, assumed that he meant that the $10,000 was to be paid out of the $75,000 named by them, and wrote to him that they were

> ''very confident that our clients will not pay a commission to exceed ten per cent of the amount which they receive in cash or kind and only when they receive it and that deducted from that ten per cent must be any other expenses incident to the transaction'' (p. 101).

To which plaintiff replied:

> ''I wish to state that I am not expecting you to pay me a commission of ten per cent on the purchase price of $75,000. I am taking care of myself over that amount and have an understanding with the parties having the purchase of the property under consideration for a commission of ten per cent when the sale is concluded'' (p. 105).

As plaintiff had disclosed to the Stauffer Chemical Company the fact that defendant was willing to sell for $75,000 *he put it out of the power of defendant to ask more even if the Chemical Company had been willing to pay $100,000.* Acting in his own interest he so shaped the matter as to compel defendant to acquiesce in the payment of a larger commission than otherwise it would have consented to. *He did not try to get the best figure possible for the defendant* but he used his knowledge of defendant's price to provide a large commission for himself. By pursuing this course he jeopardized the sale and brought a loss upon both the defendant and himself. If ever there was a case where a man made his bed and should lie in it, this is that case.

*Payseno v. Swensen et al.,* 178 Fed. 999,

is directly in point. In that case the brokers had a contract whereby they were to receive a commission of fifty cents per acre for land sold at a specified price. An exchange of lands was arranged with parties produced by the brokers. The Court said in ruling that plaintiff was not entitled to recover:

> "There [referring to the case of McMillin vs. Beves, 147 Fed. 218] it was said that the broker was entitled to a commission though the contract was made upon modified terms. But as I said before that must be construed with reference to the precise case which is under discussion. In that case the jury could find and the Court may very well hold that by virtue of the contract when the proposed purchaser was

> introduced to the owners of the bonds they agreed to pay a commission to the broker whether the sale was made upon the terms asked or not. * * * I do not see how a real estate broker stands upon any other basis than any other contractor, and unless he fulfills his contract and produces a purchaser who is willing to pay upon the terms named, he cannot recover. Who knows whether the defendants in this case would have been willing to pay a commission of fifty cents an acre if they received $8 instead of $10 an acre for the land?"

The case of *Holcomb v. Stafford,* 113 N. W. 449, cited with approval in the *McMillin* case, *supra,* is on all fours with the case at bar. In that case the agreement with the broker was that he should receive a commission whatever the property was sold for to a purchaser produced by him in excess of a stipulated sum. The property was sold at the net price. The Court decided that the broker was not entitled to recover either a commission *or the value of his services.* In the case at bar plaintiff himself alleges that the commission was dependent upon a production of a purchaser who was *"ready, willing and able"* to pay a sum *in excess of $75,000,* for the property. Now there is no evidence that the Stauffer Chemical Company was willing to pay in excess of $75,000 for the property. On the contrary, the evidence is that it was *not willing* to pay such sum, and under the arrangement finally entered into with defendant, defendant will receive very much less than $75,000. The fact that the Stauffer Chemical Company had the right under the agreement of

May 1, 1907, to purchase for $85,000 is immaterial (*Lawrence v. Pederson,* 34 Wash. 1). The acceptance of such an option indicates merely that that company was willing to consider a purchase at that figure, not that it was willing to pay it. And upon consideration it concluded not to take the property under the option and did not do so. Hence plaintiff is not entitled to recover.

*Ames v. Lamont,* 83 N. W. 780;
*McArthur v. Slauson,* 9 id. 784.

If the judgment in this case is permitted to stand, it will write a new chapter into the law of brokerage, and one which will cause no end of mischief. Clearly, such a recovery cannot be based upon contract, much less the alleged contracts pleaded in the complaint. It partakes of the nature of damages involving an unwarranted restriction of the rights of an owner and constitutes a virtual confiscation of a portion of his property or its equivalent. In vain will the record and the authorities be searched to find either a stated or sound theory of the evidence or the law upon which to compute or sustain the recovery.

4. As the Court made no findings of fact the record fails to show which of the three counts in the complaint was intended to be sustained by the judgment. As above stated, however, the amount of the judgment indicates that the Court found against the plaintiff in respect to the first and third counts and awarded him judgment under

the allegations of the second count which proceeded upon *quantum meruit.* Had the first count been sustained, the judgment would have been for $10,000; or had the third count been sustained the judgment would have been for 10% of $7950.00, the amount paid by the Stauffer Chemical Company prior to the commencement of the action, or for 10% of $51,000, the amount paid at the time of the trial (p. 35). And moreover as we have shown, the evidence does not sustain the first or third counts. But it is not incumbent upon defendant to establish that the judgment rests upon the second count in order to secure a reversal. If, as we contend, *the Court erred in admitting evidence relating to the reasonable value of plaintiff's services,* the judgment must be reversed even if the first or third count was sustained by the evidence, because, as was held in *St. Lewis Railway Co. v. Needham,* 63 Fed. 107 (114):

> "A general verdict cannot be upheld where there are several issues tried and upon any one of them error is committed in the admission or rejection of evidence, or in the charge of the Court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related and that they were controlled in their finding by that ruling."

To the same effect see, also,

*Maryland v. Baldwin,* 112 U. S. 490;

*What Cheer Coal Co. v. Johnson,* 56 Fed. 810 (813);

*Creswell etc. Co. v. Martindale,* 63 Fed. 84 (90);

*Lyon, Potter & Co. v. 1st Natl. Bank,* 85 Fed. 120 (125);

*Durant Mining Co. v. Percy Consolidated Mining Co.,* 93 Fed. 166 (169);

*Fireman's Fund Insurance Co. v. McGreevy,* 118 Fed. 415 (419).

It follows necessarily that plaintiff is in no better position than if he had sued upon the second count alone; and if, as we think we have demonstrated in the foregoing argument, plaintiff is not entitled to recover upon a *quantum meruit* (and hence that the Court erred in admitting evidence as to the reasonable value of his services), the judgment must be reversed.

Dated, San Francisco,
March 6, 1915.

Respectfully submitted,

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*Attorney for Plaintiff in Error.*